IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JUIRSDICTION

SECOND APPEAL NO.632 of 2001

1. Raghunath Laxman Jadhav

2. Dadashabe Laxman Jadhav

3A Smt.Jijabai Shivaji Jadhav

3B Prakash Shivaji Jadhav

3C Vilas Shivaji Jadhav

3D Machindra Shivaji Jadhav

3E Shobha anna Jagdale ..... Appellants

V/s

1A Narayan Ananda Jadhav

1B Dinkar Ananda Jadhav

1C Shankar Ananda Jadhav

2. Pandharinath Chandru Jadhav

3. Kashibai Namdeo Barge

4. Suman Parshuram Thorat

5. Shakuntala Vijay Phadatare ..Respondents

Mr.M.M.Vashi for Appellants

Mr.Dilip Bodake for Respondent no.1A,B,C and 2 to 5

CORAM:S.R.SATHE,J.

DATED:3rd Sept.2004

ORAL JUDGMENT :-

1 Being aggrieved by the judgment and order passed by the 3rd Additional District Judge,Satara in Regular Civil Suit no.170 of 1991 whereby the judgment and order passed by the Court of Civil Judge, J.D., Vaduj in Regular Civil suit No.231 of 1980, decreeing the plaintiff's suit for declaration, permanent injunction and possession was partly confirmed and defendants appeal in respect of possession and mesne profits was dismissed, the original defendant has preferred this second appeal.

2. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

3. Brief facts giving rise to this appeal are as under :-

. According to the plaintiff property in para 1 of the plaint was purchased by him and since then he was all along in possession of the same. The defendant nos.1 and 2 who are the sons of

plaintiff’s real brother Laxman and defendant nos.3 and 4, sons of plaintiff’s brother Chadnru were not at all concerned with the suit property. They however obstructed the plaintiff’s possession of the suit land and started laying a claim regarding ownership of the suit property. The plaintiff, therefore, filed a suit for declaration that the suit property is owned by him and also sought permanent injunction restraining defendants from obstructing plaintiff’s possession.Subsequently in the year 1989 the plaintiff carried out amendment to the present suit and also claimed possession of the suit property.

4. The defendant nos.1 to 4 filed joint written statement at exh.30 and resisted the suit claim. They denied the plaintiff’s allegation that the suit property has been purchased by him. On the contrary they contended that the suit property as well as some other properties were joint family properties of plaintiff, defendant’s father and other brothers. They also denied plaintiff’s allegation that he was cultivating the suit land and in the year 1980 taken Bajara and cotton crops in the same. According to the defendants the suit property and other properties were joint family properties and oral partition had taken place

between plaintiff and defendant and except the land mentioned at Sr.No.2 the names of respective sharers were entered in the record of rights and they were accordingly cultivating the lands. However, even after the said oral partition the name of the plaintiff remained in the record of rights in respect of the suit property and taking undue advantage of the said position plaintiff in fact started laying a claim that the lands are owned by him. The defendants, therefore, prayed for dismissal of the suit. During the pendency of the suit the original plaintiff Ananda died and his legal heirs were brought on record.

5. The defendants 5 to 7 daughters of the deceased Ananda, filed a joint written statement and they supported the plaintiff's claim.

6. On these pleadings the learned trial Court framed issues at Exh.47. After considering the evidence adduced by both the parties the trial Court came to the conclusion that the suit lands are purchased by original plaintiff and defendants are not at all concerned with the same. The trial Court, therefore, decreed the suit in plaintiff's favour. The said order was challenged by the defendants in the District Court at Satara and the

first appellate Court confirmed the finding of the trial Court to the effect that lands in question are purchased by Ananda and hence decree for declaration and possession was passed in favour of the plaintiff. The said is under challeng in the present appeal.

7. From perusal of the record it appears that on 3-4-2002 this Court has passed the following order and framed the following substantial questions of law.

"i. Whether there has been a defect in procedure while adjudicating issues of controversy resulting in failure to record correct verdict by the trial Court and first appellate Court?

ii. Whether the findings recorded by the first appellate court confirming the findings recorded by the trial court are not consistent with the evidence on record and pleadings of the parties which are in controversy on issues involved?

iii. Whether the impugned judgment is improper, incorrect and perverse and illegal?"

8. In this appeal before me, Mr.M.M.Vashi,learned

Advocate for the defedndants has urged two points, Firstly, he submitted that the trial Court has erred in admitting the certified copies of the sale deeds produced by the plaintiffs. Secondly, he canvassed before me that both the Courts below have given unnecessary importance to written statement filed by the present defendants in the earlier suit filed by Bayaji. Lastly, he submitted that courts below ought to have held that the suit property was the joint family property and it was necessary for the plaintiff to discharge the burden or proving that the suit property is his self acquired property. As against this, the learned Advocate for the plaintiff supported the judgment and order passed by both the courts below.

9. It is not in dispute that original plaintiff Ananda has 3 brothers viz. Laxman, Chandru, and Bayaji. Laxman was the son. Their father Kondiba Jadhav expired some times in the year 1918. Admittedly, there wa, joint family of 4 brothers and the said family had several agricutlrual lands. In view of this admitted position the learned Advocate for the defendants argued before me that as the plaintiff had alleged that the suit property is purchased by him it was necessary for the plaintiff to prove the same. However, according to

him there is no sufficient evidence adduced by the plaintiff to discharge the said burden. In order to substantiate this proposition the learned Advocate for the defendants has placed reliance on 2 cases viz. Punjabrao Deorao V/s Sheshrao Baburao and Ors. reported in AIR 1962 Bom. 175 wherein the Division bench of this Court has observed that proof of the existence of a Hindu joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon the one asserting that any item of property was joint. But where it is established that the family possessed some joint proeprty which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. In other case V.D.Dhanwatey V/s the Commissioner of Income Tax,Madhya Pradesh,Nagpur and Bhandara reported in AIR 1968 SC 683 it has been observed by the apex court that general doctrine of Hindu law is that property acquired by a karta or a co parcener with the aid or assistance of joint family assets is impressed with the character of joint family property. To put it differently, it is an

essential feature of self acquired property that it should have been acquired without assistance or aid of the joint family property. The test of self acquisition by the karta or coparcener is that it should be without detriment to the ancestral estate. The proposition laid down in the above said rulings are not disputed and cannot be disputed. However, the question arises whether facts and circumstances of the present case are such wherein the ratio of the above cited rulings can not be made applicable.

10. Here it is the case of the plaintiff that the property in question has been purchased by him and it is his self acquired property. In order to cast the burden on plaintiff to prove as to whether the suit property was in fact purchased by him by his own funds or by the funds of the joint family or with the help of necalus, it is first essential to find out as to when the property in question has been purchased by the plaintiff and whether at that time there was in fact joint family or whether the partition had taken place between them at the material time i.e. when the plaintiff purchased the property. If the joint family was in existence of the time of purchase then obviously he burden lies on the plaintiff to show that whatever

property was purchased by him was out of his own income but if it is not so, then obviously the burden will not lie on the plaintiff but on the contrary it would be necessary for the defendants to show that the property in question has been purchased by one of the coparcener out of joint family property income. While considering this aspect we have to take into consideration the period or dates when the properties in question have been purchased by the plaintiff. The property bearing Survey nos. 707 and 708 have been purchased on 24-3-1925.Property bearing Survye No.105 is purchased on 5-7-1924 vide Exh.77 and property bearing Survey no.699 and 706 have been purchased on 18-6-1928 vide Exh.78. At this stage only I would like to mention that learned Advocate for the defendants has in fact taken a strong objection about the admission of these certified copies of the sale deeds in evidence. According to him it was necessary for the plaintiff to produce original sale deeds but instead of producing the the original sale deeds the plaintiffs produced the certified copies of the sale deeds issued by the concerned department. In order to substantiate his proposition the learned Advocate for the defendants has drawn my attention to the provisions of Section 65 of Indian Evidence Act. It runs as under :

"65. Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition, or contents of a document in the following cases -

a) When the original is shown or appears to be in the possession or power - of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it. and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason nor arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to

be easily movable.

(e) when the original is a public document within the meaning of section 74.

(f) when the original is a document of which a certified copy is permitted by this Act,. or by any other law in force in (India) to be given in evidence.

(g) When the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

. In (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

. In case (b), the written admission is admissible.

. In case (d) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

. In case (g) evidence may be given as to the general result of the documentary by any person who

has examined them, and who is skilled in the examination of such documents".

11. It is true that in the instant case the plaintiff has relied upon secondary evidence, question is whether the trial Court was right in accepting the said evidence. From perusal of the record it appears that the original plaintiff/s son has categorically stated that the original sale deeds have been burnt and as a result of the same they are required to produce the certified copies of the same. There was no reason to disbelieve the said evidence and as such relying on that statement the trial Court allowed the secondary evidence viz. certified copies of the sale deeds. So under such circumstances it appears that the secondary evidence was admissible as per provisions of section 65(c) of the Evidence Act. I do not find any sustenance in the argument advanced by the leaned Advocate for the defendant in this behalf.

12. Reverting back to the above mentioned sale deeds Exh.76, 77 and 78 we find that these sale deeds have been executed long back i.e. in the year 1925, 1924 and 1928 respectively. From perusal of the same it is very clear that Ananda i.e. original plaintiff has purchased the said

suit property. The question arises whether he has purchased it out of his own income or whether it was out of joint family fund or with the help of necalus. It is the case of plaintiff that partition between the brothers had in fact taken place long back after the death of Kondiba in the year 1918. For that purpose reliance has been placed on the mutation entry produced at Exh.81 wherein it is said that brothers got the joint family property partitioned and their names were entered as holders of their respective shares. Thus from that mutation entry it has to be held that there was severance of the status because at that point of time parties had decided to separate. So, here is a case where the property in question has been purchased by one member after the partition. So under such circumstances the above cited 2 rulings are of no use to the defendants. It is also not shown that Ananda was not in a position to purchase such properties.

13. There are some such circumstances which also go to show that the property in question must have been purchased by plaintiff out of his own income and the other brothers were also aware of the said position and that is why they did not take any objection for the same. Not only that but though

the name of plaintiff alone was shown as owner of the property in question, for a period of about 50 years at no point of time any other member took objection for the same. While considering this aspect it must also be noted that admittedly out of 4 brothers Laxman was eldest and such manager karta of the joint family. So if at all any property would have been purchased for the joint family then such purchase would have been in the name of manager or karta of the joint family. But in the instant case we find that the sale deeds in question are in the name of Ananda. It is not at all the case of the defendants that for any particular reason the property in question was purchased in the name of Ananda. So taking into consideration this aspect also it is very clear that the property in question must have been purchased by Ananda out of his own income.

14. It appears that the defendants tried to contend that suit property and even the other properties have been kept common and there is in fact no partition. However, this stand was against the pleadings because even in written statement the defendants had contended that oral partition had taken place long back. Besides this, admittedly, plaintiff’s brother Bayaji had filed Regular Civil

Suit No.122 of 1989 and in that present defendants had filed written statement wherein they had clearly stated that partition has taken place between the brothers. Now this written statement has to be treated as an admission given the defendants. Attempt was made to show that this written statement or admission was not put to the defendants or no opportunity was given to them to explain the said admission. But if we peruse the deposition of the defendant, then we find that the defendant was in fact controverted with this admission and he in fact tried to give some explanation about the same. However as the said explanation was not satisfactory the trial Court rightly rejected it. So, both the courts below have rightly consisdered the previous stand of the defendants and held that the partition had in fact taken place between the said brothers prior to the sale deeds in question.

15. In view of above, it is very clear that both the courts below have elaborately discussed the entire evidence in proper manner and correctly held that the suit properties in question are the self acquired properties of the plaintiff and the defendants are not concerned with the same and therefore rightly decreed the plaintiff’s suit for

declaration and possession. In this view of the matter there is no sustenance in this appeal. The appeal is dismissed. In the circumstances of the case parties to bear their own costs.

16. At this stage the learned advocate for the defendants submitted that operation of this order be stayed for 8 weeks as defendants intend to approach the apex Court.However, consider the fact that there was concurrent findings and it has already been observed that the property in question has been purchased by the plaintiff there is no reason to stay the operation of the order passed in this second appeal. Hence prayer to that effect is rejected.

. Certified copy expedited.

(S.R.SATHE,J)